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A Privacy Loophole

Just a few days ago the Supreme Court declined to review a decision by the Third U.S. Circuit Court of Appeals holding that Presidents can authorize, without any judicial approval, "foreign intelligence" wiretaps in the interest of national security. The effect of that refusal is to leave the Circuit Court ruling, at least for the time being, the law of the land. It pokes a loophole in the Fourth Amendment large enough for a myriad of microphones to penetrate.

What the Fourth Amendment says, without any qualification about "national security," is that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In 1967, the Supreme Court ruled that electronic eavesdropping is a form of search circumscribed by the Fourth Amendment, and it declared: "Over and again this court has emphasized that the mandate of the Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."

Former President Richard Nixon and the most celebrated of his Attorneys General, John N. Mitchell, who entertained rather expansive ideas about executive power and privilege, contended that they could conduct any sort of surveillance they pleased — and without bothering to get judicial authorization — if they believed that national security required it. A couple of years ago the Court unanimously told them that they possessed no such power, at least in relation to domestic threats to security.

But the Circuit Court decision, which the Supreme Court declined to review the other day, concerned electronic surveillance conducted in the case of a Soviet spy. The rationale of the decision is interesting and, in some degree, impressive. It rests on a recognition that the President has extraordinary responsibilities in conducting the country's foreign relations and it asserts: "Foreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties."

The trouble with this rationale is that the definition of foreign intelligence threats to national security is so slippery. One begins with a leak of some government "secret" and ends by tapping the telephones of a covey of newspaper reporters and a pride of political opponents. One cocks an electronic ear at the conversations of foreign embassies and comes up with the recorded voice of a heavyweight boxing champion. Moreover, the rationale invites other forms of arbitrariness in the name of national security — breaking and entering, burglary and the like. Unchecked power tends almost inevitably to be used arbitrarily.

It is true, of course, that respectful obedience to the command of the Fourth Amendment ties the hands of a President in some measure. That is what it is supposed to do. But the Fourth Amendment is not a straitjacket and the restraint it imposes really does not so "seriously fetter the Executive." Magistrates are not indifferent to national security, and it is not overwhelmingly difficult to get a wiretap warrant when executive authorities have reasonable grounds for wanting one. Indeed, court orders to tap telephones have been issued with notorious ease. The most that a warrant requirement can be said to accomplish is to demand some executive justification for intruding on the privacy of American citizens and thus to check the grossest excesses of official surveillance.

If there is an element of risk — or of some sacrifice of efficiency — in this kind of restraint on executive authority, it is a risk inherent in the nature of a free society.

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